80-1650

No.

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IN THE

Supreme Court of the United States

OCTOBER TERM 1980

THE STATE OF ILLINOIS,

Petitioner,

v.

MARLA ZEGART,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS

TYRONE FAHNER,
Attorney General of the State
of Illinois
MELBOURNE A. NOEL, JR.
Assistant Attorney General
188 West Randolph Street
(Suite 2200)
Chicago, Illinois 60601
J. MICHAEL FITZSIMMONS
State's Attorney for DuPage County
THOMAS L. KNIGHT
BARBARA A. PREINER
Assistant State's Attorneys
207 South Reber Street
Wheaton, Illinois 60187
Attorneys for Petitioner

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QUESTION PRESENTED FOR REVIEW

Whether the Respondent's right to be free from double jeopardy precludes the State of Illinois from charging and trying the Respondent for reckless homicide subsequent to her entry of a plea of guilty to the traffic offense of crossing the median?

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PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS

Petitioner, the State of Illinois, respectfully prays that a Writ of Certiorari be issued to review the judgment of the Supreme Court of Illinois.

OPINION BELOW

The Supreme Court of Illinois issued its opinion in this case on December 1, 1980, and it may be found at ____ Ill. 2d ____, 415 N. E. 2d 341, 47 Ill. Dec. 336 (1980). The court in its opinion found that the State intended to use the factual basis which led to the defendant's first conviction of the traffic offense "as the basis for the second conviction," and by so doing, the court concluded, the State would be violating the double jeopardy clause of the Fifth Amendment of the United States Constitution. Having reached that conclusion, the Court declined to address the statutory arguments raised by the

parties. The Appellate Court—Second District, by order, had previously affirmed the trial court's dismissal of this charge. A copy of the Appellate Court's order, as well as a copy of the opinion of the Illinois Supreme Court is appended to this petition.

JURISDICTION OF THE COURT

The opinion of the Illinois Supreme Court affirming the order of the Appellate Court was rendered on December 1, 1980. The People pursued a petition for rehearing in the Illinois Supreme Court, which was denied on January 29, 1981. This petition is filed within sixty days of that denial. The jurisdiction of the Supreme Court of the United States to hear this case is invoked under 28 U.S.C. 1257(3), since in the proceedings in the state courts of Illinois the Respondent has specifically set up, and throughout asserted, an alleged violation of her rights arising under the Constitution of the United States.

CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution amendment V.;

> "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger, nor shall any person be subject for the same offense to be twice placed in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property without due process of law; nor shall private property be taken for public use without compensation".

STATUTES

Illinois Revised Statutes, chapter 38, section 9-3(a), (1975);

> A person who unintentionally kills an individual without lawful justification commits involuntary manslaughter if his acts whether lawful or unlawful which cause the death are such as are likely to cause death or great bodily harm to some individual, and he performs them recklessly, except in cases in which the cause of the death consists of the driving of a motor vehicle, in which case the person commits reckless homicide.

Illinois Revised Statutes, chapter 95½, section 11-708(d), (1975);

> Whenever any highway has been divided into 2 or more roadways by leaving an intervening space or by a physical barrier or a clearly indicated dividing section so constructed as to impede vehicular traffic, every vehicle must be driven only upon the right-hand roadway unless directed or permitted to use another roadway by official traffic-control devices or police officers. No vehicle may be driven over, across, or within any such dividing space, barrier, or section, except through an opening in the physical barrier, or dividing section, or space, or at a cross-over or intersection as established by public authority.

STATEMENT OF THE CASE

On December 19, 1975 a motor vehicle driven by the Respondent, Marla T. Lenza, now known as Marla T. Zegart, while travelling east on the East-West Tollway (a four-lane highway with a grassy median dividing the eastbound and westbound lanes) crossed over onto the tollway's westbound lanes and struck a vehicle driven by Raymond McJohn, Jr. The collision killed Margaret McJohn and Kathryn J. Grayheck. A traffic citation was issued to the Respondent charging her with crossing a highway median in violation of Illinois Revised Statutes, Chapter 95½, Section 11-708(d), (1975). On January 14, 1976 she pled guilty to that charge.

On May 14, 1976 the Respondent was charged with two counts of reckless homicide in violation of Illinois Revised Statutes, Chapter 38, Section 9-3(a), (1975). These charges were based on the same incident of December 19, 1975. The Respondent moved to dismiss the indictments, claiming double jeopardy but her motion was denied. She also moved for a bill of particulars which was provided. That bill of particulars listed eight acts or omissions which the People intended to use as proof of the Respondent's recklessness at the time of the incident. One of the eight listed acts was "Driving across the center line and median strip."

In answer to the Respondent's motion for an additional bill of particulars, the People specified the facts they expected to prove and also moved to amend the bill of particulars by eliminating driving across the median strip as one of the reckless acts on which they would rely to prove reckless homicide. The People stated in their motion to amend the bill of particulars that their use of evidence regarding the crossing of the median would be limited to using this evidence not to show recklessness, but rather to show the causal nexus between the Respondent's other acts of recklessness and the collision which resulted in the deaths of two teenage girls. This amendment was allowed. The original bill of particulars and the motion to amend it are attached to this petition as Appendix D.

Based on new evidence and the amended bill of particulars the Respondent brought a second motion to dismiss based on double jeopardy which was later amended. Extensive arguments were heard on this motion. As a result, the court dismissed the indictments on March 15, 1977. The People appealed to the Appellate Court—Second District, which affirmed the trial court in an unpublished order. The People then appealed to the Illinois Supreme Court which affirmed the Appellate Court on December 1, 1980. The People's petition for rehearing was denied on January 29, 1981.

REASONS FOR GRANTING THE WRIT

THE RESPONDENT'S GUILTY PLEA TO THE TRAFFIC OFFENSE OF CROSSING THE MEDIAN DOES NOT, BY REASON OF DOUBLE JEOPARDY, PRECLUDE THE STATE FROM CHARGING THE RESPONDENT WITH AND TRYING HER FOR THE CRIMINAL OFFENSE OF RECKLESS HOMICIDE.

The Respondent was driving east on the East-West Tollway (an Illinois toll highway of four lanes with a grassy median strip separating the eastbound lanes from the westbound lanes) at approximately 6:40 p.m. on December 19, 1975. Her vehicle left the eastbound lanes, travelled across the grassy median, and collided with a westbound automobile being driven by Raymond McJohn, Jr. Two thirteen year old girls, passengers in the McJohn vehicle, were killed as a result of this collision. An Illinois State Police Officer who was called to the scene issued a traffic ticket to the Respondent citing her for the offense of crossing the median, in violation of Illinois Revised Statutes, chapter 95½, section 11-708(d), (1975). The Respondent pled guilty to this offense on January 14, 1976.

An investigation of the collision was undertaken, and the Respondent was subsequently indicted for two counts of reckless homicide on May 14, 1976. In response to the Respondent's motion for a bill of particulars, the People listed eight separate acts or omissions the People would use in proving the Respondent's recklessness. The eight acts or omissions were listed as follows:

1. Driving too fast for conditions.

2. Failure to reduce speed to avoid an accident.

3. Driving across the center line and median strip.

4. Failure to drive her vehicle in the proper lane of the roadway.

5. Failure to exercise due care for the safety of herself and others rightfully upon the roadway.

6. Improper passing on the right.

7. Improper passing on the left.

8. Failure to wear prescription lenses as required by her driver's license.

The Respondent subsequently moved for an additional bill of particulars. The People responded to that motion with a more specific bill of particulars, and also moved to amend the bill of particulars previously filed.

In amending the previous bill of particulars, the People sought to remove as one of the specified acts of recklessness the act of "Driving across the center line and median strip." The People's motion to amend stated that while the People would not seek to use the act of crossing the median as proof of the Respondent's recklessness, their evidence would show that the Respondent's vehicle crossed the median "in order to show the causal nexus between the [Respondent's] conduct prior to actually crossing the median strip and the death of the two victims named in the indictment." The People's motion to amend the bill of particulars was allowed.

On January 31, 1977, the Respondent filed a motion to dismiss the indictment, alleging that it violated the Respondent's right to be free from double jeopardy under both the United States Constitution and the Illinois Constitution and statutes. After extensive argument on this motion, the trial court granted the Respondent's motion and dismissed the indictment. The People appealed to both the Illinois Appellate Court and the Illinois Supreme Court, both of which affirmed the dismissal. The Illinois Supreme Court specifically stated that its holding was based solely on the double jeopardy provisions of the United States Constitution.

The Illinois Supreme Court found the instant case distinguishable from *Illinois* v. *Vitale,* ____ U. S. ____, 100 S. Ct. 2260, 65 L. Ed. 2d 228 (1980) because it found that the People's bill of particulars, as amended, disclosed that the People would use "the factual basis which led to the first conviction as the basis for the second conviction." (Opinion p. 4, Appendix A.) This Honorable Court stated in *Vitale* that:

> ... if in the pending manslaughter prosecution Illinois relies on and proves a failure to slow to avoid an accident as the reckless act necessary to prove manslaughter, *Vitale* would have a substantial claim of double jeopardy ... [____ U. S. at ____, 100 S. Ct. at 2267, 65 L. Ed. 2d at 238].

The Illinois Supreme Court cited this language as support for its holding that the People's use of evidence of crossing the median, since it would provide "the basis for the second conviction," would be prohibited by the principles of double jeopardy. It is the People's position that the Illinois Supreme Court was incorrect in so holding.

That one charged with a criminal offense may not be tried twice for the same offense is a principle which is ingrained in the American legal system, having been recognized in both the Constitution of the United States and in case law, Constitution of the United States, Amendment V, *Blockburger* v. *United States,* 248 U. S. 299, 52 S. Ct. 180, 76 L. Ed. 306 (1932). The key question to be resolved in determining whether a person once tried may be tried subsequently is whether the subsequent trial is for the same offense, for the double jeopardy prohibition concerns itself with the identity of the offenses, not the identity of the act or series of acts out of which they arise, *Albernaz* v. *United States,* ____ U. S. ____, 28 Crim. L. Rptr. 3099, 3102 (Mar. 9, 1981); *Blockburger* v. *United States, supra, In re Nielsen,* 131 U. S. 176, 9 S. Ct. 672, 33 L. Ed. 118 (1889).

The standard to be employed in determining whether the prior offense and the subsequent offense are the same offense is

whether the same evidence is required to prove both offenses. This Honorable Court articulated this "same evidence" standard as follows:

> . . . [T]he test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of an additional fact which the other does not . . . [*Blockburger* v. *United States,* 284 U. S. at 304].

Thus it is only when the proof of both offenses is identical, or all of the elements of one offense are contained within the other, that double jeopardy prohibits prosecution for both offenses.

The Illinois Supreme Court was apparently of the opinion that all of the elements of the offense of crossing the median were contained within the offense of reckless homicide. The Court relied for this conclusion upon the People's representation that evidence that the Respondent crossed the median would be presented at her trial for reckless homicide, even though the People clearly stated that the crossing of the median would not be presented as one of the indicia of recklessness.

It is the People's position that not all of the elements of crossing the median are contained within the elements of reckless homicide. The "same evidence" would not and indeed could not be used to prove both offenses.

The pertinent elements of crossing the median as set forth by Illinois Statute are as follows:

> 1. That the highway has been divided into two or more roadways by an intervening space, physical barrier, or dividing section; and
>
> 2. That the person charged, without authority, drove a motor vehicle over, across, or within any such dividing space, barrier or section. [Ill. Rev. Stat., ch. 95½, sec. 11-708(d), (1975)].

The pertinent elements of reckless homicide are set forth by Illinois statute as follows:

1. That a person must be killed;

2. That the person who kills must be acting unintentionally and without lawful justification;

3. That the acts of the person who kills were such as were likely to cause death or great bodily harm to some individual; and

4. That these acts were performed recklessly. [Ill. Rev. Stat., ch. 38, sec. 9-3(a), (1975)].

Each one of these offenses contains elements clearly not embodied in the other. Reckless homicide does not require proof of a divided highway with or without a median, nor does it require proof that a median was crossed as an element of the offense. Crossing a median does not require proof that anyone died, nor does it require the performance of acts which were likely to cause death or great bodily harm, nor does it require proof of recklessness. Thus the People conclude that the Illinois Supreme Court was incorrect in finding that a conviction for crossing the median precluded for reasons of double jeopardy the charging and trying of the Respondent for the offense of reckless homicide.

Under the test set forth in *Blockburger,* the court's inquiry must be directed toward whether as a matter of law the proof of the greater offense must always contain all of the elements of the lesser offense.

Under that test, the statement of this Honorable Court in *Vitale* is most instructive in determining the proper outcome of this case. In *Vitale* this court stated:

> The point is that if manslaughter by automobile does not *always* entail proof of a failure to slow, then the two offenses are not the 'same' under the *Blockburger* test. *The mere possibility that the State will seek to rely on all of the ingredients necessarily included in the traffic offense to establish an element of its manslaughter case would not be sufficient to bar the latter prosecution.*

IV

> If, as a matter of Illinois law, a careless failure to slow is *always* a necessary element of manslaughter by automobile, then the two offenses are the 'same' under *Blockburger* and Vitale's trial on the latter charge would constitute double jeopardy under *Brown* v. *Ohio.*" (Emphasis added.) [____ U. S. at ____, 65 L. Ed. 2d at 237-238].

Clearly, reckless homicide does not always require proof of crossing the median. The dissenting members of the Illinois Supreme Court in the case at bar cited this language from *Vitale* as the most recent statement of the still viable *Blockburger* rule; the rule which should have been, but was not, applied to this case.

The situation in the case at bar may readily be distinguished from that in *Brown* v. *Ohio,* 432 U. S. 161, 97 S. Ct. 2221, 53 L. Ed. 2d 187 (1977). In *Brown* the defendant was convicted of joyriding and then subsequently tried for theft of the same automobile. This Court noted in its opinion "The prosecutor who has established joyriding need only prove the requisite intent in order to establish auto theft; the prosecutor who has established auto theft necessarily has established joyriding as well." 432 U. S. at 167-168. Joyriding would never require any proof beyond that required for auto theft and thus the two offenses were the "same offense" for purposes of double jeopardy.

Likewise in *Harris* v. *Oklahoma,* 433 U. S. 682, 97 S. Ct. 2912, 53 L. Ed. 2d 1054 (1977), the defendant who was convicted of felony murder based on an armed robbery in which someone was killed, could not subsequently be tried for the armed robbery because they were the "same offense." There was no element of armed robbery which was not included in the offense of felony murder. The conviction for felony murder could not have been had if all of the elements of armed robbery were not proven. Under the *Blockburger* test, a

conviction for felony murder will always preclude the possibility of a subsequent prosecution for the underlying felony since all of the elements of the underlying felony must of necessity always be proven in the prosecution for felony murder.

With respect to the situation in the case at bar, however, it is clear that the People need not always prove as an element of reckless homicide the offense of crossing the median. It would not be essential to the successful prosecution of the reckless homicide for the People to prove that the Respondent was travelling on a divided highway with a median separating the lanes. Nor would it be essential to prove that the Respondent's vehicle crossed the median. Even in the instant case, the People made clear that there were many other acts which they intended to use in proving the Respondent's recklessness.

In commenting on the interrelationship of the Illinois statutes relating to manslaughter and failing to reduce speed to avoid an accident, this Honorable Court stated:

> . . . [I]f in the pending manslaughter prosecution Illinois relies on and proves a failure to slow to avoid an accident as the reckless act necessary to prove manslaughter, Vitale would have a substantial claim of double jeopardy . . . [*Illinois* v. *Vitale*, ____ U. S. at ____, 65 L. Ed. 2d at 238].

By analogy, if in the prosecution for reckless homicide, the People relied upon the Respondent's crossing the median as "*the* reckless act" necessary to prove reckless homicide, the Respondent would have a substantial claim of double jeopardy. The People specifically stated, however, in their amended bill of particulars and in argument before the trial court, that they would not be relying upon the crossing of the median as the reckless act necessary to prove reckless homicide. The People's proof of recklessness would include the Respondent's driving too fast for conditions, her failure to reduce speed to avoid an accident, her failure to drive her vehicle in the proper lane of

the roadway (the prosecutor stated in argument before the trial court that this allegation was related to the Respondent's driving on the shoulder of the road), her failure to exercise due care, and her improper passing on both the right and the left. It is these acts and omissions which would comprise the People's proof of recklessness. To the extent that the Respondent's crossing of the median would be mentioned at all at trial, it would be only to demonstrate how the Respondent's recklessly driven vehicle came to collide with the automobile in which the victims were riding. Crossing the median would not be an element of this reckless homicide prosecution.

Unlike *Brown* v. *Ohio, supra,* it cannot be said that any prosecutor who proves reckless homicide also of necessity proves crossing the median. Unlike *Harris* v. *Oklahoma, supra,* it cannot be said a conviction for reckless homicide cannot be had without a conviction for crossing the median. The People would not need to prove the crime of crossing the median in all of its elements in order to prove reckless homicide. The conduct of the Respondent in the instant case would have been just as reckless had her car not crossed the median.

The Illinois Supreme Court in its opinion failed to correctly interpret and properly apply the *Blockburger* rule. The People urge this Honorable Court to grant this petition and issue a Writ of Certiorari to review the judgment of the Illinois Supreme Court. The misapprehension of the *Blockburger* rule by the Illinois courts as reflected in this case is a very serious matter and one which will result in continuing injustice if it is not corrected. The misapprehension was unfortunately not dispelled by the Illinois Supreme Court's reading of this Court's *Vitale* decision. The People request that this Honorable Court grant the People's Petition for a Writ of Certiorari, and ultimately vacate the judgment of the Illinois Supreme Court and remand this case for reinstatement of the prosecution for reckless homicide.

CONCLUSION

For all of the foregoing reasons, the Writ of Certiorari should be issued to review the judgment and opinion of the Supreme Court of the State of Illinois.

Respectfully submitted,

TYRONE FAHNER,
Attorney General of the State
of Illinois
MELBOURNE A. NOEL, JR.
Assistant Attorney General
188 West Randolph Street
(Suite 2200)
Chicago, Illinois 60601
J. MICHAEL FITZSIMMONS
State's Attorney for DuPage County
THOMAS L. KNIGHT
BARBARA A. PREINER
Assistant State's Attorneys
207 South Reber Street
Wheaton, Illinois 60187
Attorneys for Petitioner

APPENDIX A

Supreme Court Opinion

OPINION
SUPREME COURT OF ILLINOIS
UNITED STATES OF AMERICA

STATE OF ILLINOIS
SUPREME COURT } ss.:

At a Term of the Supreme Court, begun and held in Springfield, on Monday, the tenth day of November in the year of our Lord, one thousand nine hundred and eighty, within and for the State of Illinois.

PRESENT: JOSEPH H. GOLDENHERSH, CHIEF JUSTICE

JUSTICE ROBERT C. UNDERWOOD JUSTICE DANIEL P. WARD
JUSTICE HOWARD C. RYAN JUSTICE WILLIAM G. CLARK
JUSTICE THOMAS J. MORAN JUSTICE THOMAS E. KLUCZYNSKI

TYRONE C. FAHNER, ATTORNEY GENERAL
LOUIS F. DEAN, MARSHAL
ATTEST: CLELL L. WOODS, CLERK

Be it Remembered, that afterwards, to-wit, on the 1st day of December, 1980 the opinion of the Court was filed in said cause and entered of record in the words and figures following, to-wit:

Docket No. 51229—Agenda 5—May 1979.

THE PEOPLE OF THE STATE OF ILLINOIS,
Appellant,
v.
MARLA ZEGART,
Appellee.

Appeal from Appellate Court
Second District

MR. JUSTICE MORAN delivered the opinion of the court:

The question in this case is whether defendant's conviction for the offense of driving across a highway dividing median bars a subsequent prosecution for reckless homicide when both charges arise out of the same occurrence.

On December 19, 1975, an eastbound automobile, driven by defendant, Marla Zegart, crossed over a dividing median of the East-West Tollway and struck a westbound vehicle driven by Raymond McJohn, Jr. As a result, two passengers in the McJohn vehicle, Margaret McJohn and Kathryn J. Grayheck, were killed. A State trooper at the scene issued a traffic complaint to defendant, charging her with crossing over a highway dividing median in violation of section 11—708(d) of the Illinois Vehicle Code (Ill. Rev. Stat. 1975, ch. 95½, par. 11—708(d)). On January 14, 1976, in the circuit court of Du Page County, defendant submitted a plea of guilty, was convicted, and was fined. Approximately four months later, defendant was indicted on two counts of reckless homicide (Ill. Rev. Stat. 1975, ch. 38, par. 9—3(a)). Defendant moved to dismiss the indictment based on sections 3—3 and 3—4 of the Criminal Code of 1961 (Ill. Rev. Stat. 1975, ch. 38, pars. 3—3, 3—4) and on the fifth amendment to the Federal Constitution. In support of her motion, defendant stated that, at all times relevant to her initial prosecution, the Du Page County State's Attorney knew of the two fatalities which arose out of the occurrence. On March 15, 1977, the Du Page County circuit court granted defendant's motion to dismiss. The appellate court, by order (73 Ill. 2d R. 23), affirmed. It concluded that the case was indistinguishable from, and thus controlled by, the recent case of *In re Vitale* (1978), 71 Ill. 2d 229. We granted the State leave to appeal.

In *Vitale,* an automobile driven by the minor respondent struck and killed two small children. The investigating police officer issued a traffic citation charging respondent with failing

to reduce speed to avoid an accident (Ill. Rev. Stat. 1973, ch. 95½, par. 11—601). Subsequently, in a bench trial, the respondent was convicted and fined for the traffic violation. Thereafter, the State filed a petition for adjudication of respondent's wardship based on the same occurrence. The petition alleged that respondent was delinquent because he committed the offense of involuntary manslaughter while recklessly driving an automobile (Ill. Rev. Stat. 1973, ch. 38, par. 9—3). We held that the subsequent prosecution for manslaughter was barred by sections 3—3(b) and 3—4(b)(1) (Ill. Rev. Stat. 1973, ch. 38, pars. 3—3(b), 3—4(b)(1)) of our Criminal Code of 1961 (*In re Vitale* (1978), 71 Ill. 2d 229, 234-35), and by the double jeopardy clause of the fifth amendment to the United States Constitution (71 Ill. 2d 229, 235-40). Following the allowance of the State's petition for a writ of *certiorari,* the United States Supreme Court vacated the judgment and remanded the cause to this court for further proceedings because of its "doubts about the relationship under Illinois law between the crimes of manslaughter and a careless failure to reduce speed to avoid an accident, and because the reckless act or acts the State will rely on to prove manslaughter are still unknown***." *Illinois v. Vitale* (1980), ____ U.S. ____, ____, 65 L. Ed. 2d 228, 238-39, 100 S. Ct. 2260, 2267-68.

It should be emphasized that *Vitale* was before the Supreme Court on a pretrial order dismissing a petition for adjudication of wardship. At this stage of the proceedings, the court was unable to determine if, in fact, the respondent had a valid double jeopardy claim, since no evidence had been introduced and the State had not disclosed whether, in the pending manslaughter charge, it intended to rely upon respondent's failure to reduce speed to avoid the collision.

After discussing when double jeopardy may or may not occur, depending upon whether the failure to reduce speed is or is not "always" a necessary element of manslaughter by automobile, the court, in referring to *Brown v. Ohio* (1977), 432

432 U.S. 161, 169, 53 L. Ed. 2d 187, 196, 97 S. Ct. 2221, 2227, stated:

> "In any event, it may be that to sustain its manslaughter case the State may find it necessary to prove a failure to slow or to rely on conduct necessarily involving such failure; it may concede as much prior to trial. In that case, because Vitale has already been convicted for conduct that is a necessary element of the more serious crime for which he has been charged, his claim of double jeopardy would be substantial under *Brown* and our later decision in *Harris v. Oklahoma,* 433 U.S. 682, 53 L. Ed. 2d 1054, 97 S. Ct. 2912 (1977)." *Illinois v. Vitale* (1980), ____ U.S. ____, ____, 65 L. Ed. 2d 228, 238, 100 S. Ct. 2260, 2267.

In *Harris,* defendant's conviction for felony murder arose out of an armed robbery. Subsequently, the State sought prosecution for the robbery, which was held to be barred under the double jeopardy clause. In relating that holding to the *Vitale* case, the court commented:

> "[U]nder *In re Nielsen,* 131 U.S. 176, 33 L. Ed. 118, 9 S. Ct. 672 (1889), a person who has been convicted of a crime having several elements included in it may not subsequently be tried for a lesser-included offense—an offense consisting solely of one or more of the elements of the crime for which he has already been convicted. Under *Brown,* the reverse is also true; a conviction on a lesser-included offense bars subsequent trial on the greater offense.
>
> By analogy, if in the pending manslaughter prosecution Illinois relies on and proves a failure to slow to avoid an accident as the reckless act necessary to prove manslaughter, Vitale would have a substantial claim of double jeopardy under the Fifth and Fourteenth Amendments of the United States Constitution." *Illinois v. Vitale* (1980), ____ U.S. ____, ____, 65 L. Ed. 2d 228, 238, 100 S. Ct. 2260, 2267.

In the instant case, unlike *Vitale,* the State has filed an amended bill of particulars informing defendant of the basis for

the prosecution. (See *Illinois v. Vitale* (1980), ____ U.S. ____, ____, 65 L. Ed. 2d 228, 242-43, 100 S. Ct. 2260, 2270-71 (Stevens, J., dissenting)). The bill states:

> "That the People do not, at this time, expect to rely upon the act of driving across the median strip *per se* as a reckless act of the defendant. The People do expect to introduce evidence that the defendant did actually cross the median strip but only in so far as it is necessary to prove the allegations of the indictment, the remainder of the Bill of Particulars and the Additional Bill of Particulars. Specifically, the People expect to introduce evidence that the defendant crossed the median strip in order to show the causal nexus beteen the defendant's conduct prior to actually crossing the median strip and the death of the two victims named in the indictment. Also, such evidence will be introduced in support of the allegation that the defendant was driving too fast for conditions, failing to reduce speed to avoid a collision, failure to drive a vehicle in the proper lane of the roadway and improper passing on the left."

In its pleading the State concedes, prior to trial, that it intends to sustain the manslaughter charge by introducing evidence that defendant drove across the median. While it is true that reckless homicide does not "always" entail proof of driving across a median strip, under the particular facts in this case, as disclosed by the amended bill of particulars, the State does expect to rely on such conduct "insofar as it is necessary to prove the allegations of the indictment." In sum, the State intends to use the factual basis which led to the first conviction as the basis for the second conviction. We conclude that by doing so the State would be violating the double jeopardy clause of the fifth amendment to the United States Constitution (see the majority and dissenting opinions in *Illinois v. Vitale*). Having reached this conclusion, we find it unnecessary to address the arguments based on sections 3—3 and 3—4 of the Criminal Code of 1961 (Ill. Rev. Stat. 1975, ch. 38, pars. 3—3, 3—4).

For the reasons stated, the judgment of the appellate court is affirmed.

Judgment affirmed.

MR. JUSTICE UNDERWOOD, dissenting:

The court's opinion does not completely reflect the history of *In re Vitale* (1980), 71 Ill. 2d 229, a case which I believe is, in principle, indistinguishable from this one. My colleagues in *Vitale* held a prior conviction for failure to reduce speed precluded a subsequent manslaughter prosecution. The State sought *certiorari,* which was allowed, and we were subsequently requested by the Supreme Court to certify whether *Vitale* had been decided on State or Federal grounds. On March 23, 1979, we responded as follows:

> "IT IS HEREBY certified that the judgment of this Court, as expressed in its opinion in this case, is based upon federal constitutional grounds."

Despite this, my colleagues now say that *Vitale* was decided on the basis of Illinois statutory provisions as well as Federal double jeopardy provisions. That statement is, however, directly contradicted by our certification quoted above and this court's opinion in *Vitale.* There, the late Mr. Justice Dooley, speaking for my colleagues, removed any doubt as to the basis for the majority opinion by concluding it with the following paragraph:

> "For the reasons herein expressed, under the double jeopardy clause the conviction on the traffic charge of failure to reduce speed precluded the prosecution in a separate action for involuntary manslaughter." 71 Ill. 2d 229, 240.

I dissented at some length in *Vitale* because I thought the issue an important one and because I believed then, as I do now, that double jeopardy considerations barred the manslaughter prosecution *only* if manslaughter *always* included the lesser charge of failure to reduce speed. Plainly, it seemed to me, it did not.

In *Illinois v. Vitale* (1980), ____ U.S. ____, 65 L. Ed. 2d 228, 237-38, 100 S. Ct. 2260, 2267, the opinion of the Supreme Court states:

> "The point is that if manslaughter by automobile does not *always* entail proof of a failure to slow, then the two offenses are not the 'same' under the *Blockburger* test. *The mere possibility that the State will seek to rely on all of the ingredients necessarily included in the traffic offense to establish an element of its manslaughter case would not be sufficient to bar the latter prosecution.*

IV

> If, as a matter of Illinois law, a careless failure to slow is *always* a necessary element of manslaughter by automobile, then the two offenses are the 'same' under *Blockburger* and Vitale's trial on the latter charge would constitute double jeopardy under *Brown v. Ohio.*" (Emphasis added.)

The italicized portions indicate that double jeopardy considerations apply only if involuntary manslaughter *always* involves a failure to reduce speed. Since one can be guilty of involuntary manslaughter without even using a car, it is apparent that a failure to reduce speed is not *always* included in the offense of involuntary manslaughter; the fact that failure to reduce speed *may* be an element of that offense in some cases "would not be sufficient to bar the latter [manslaughter] prosecution." *Illinois v. Vitale* (1980), ____ U.S. ____, ____, 65 L. Ed. 2d 228, 237, 100 S. Ct. 2260, 2267.

My colleagues quote and reply upon later language in *Vitale* indicating that reliance by the State in the manslaughter case upon a failure to slow down would pose a "substantial" double jeopardy claim. The fact that the dissenting members of the Supreme Court viewed that same claim as "not merely *** 'substantial,' " but "dispositive" (____ U.S. ____, ____, 65 L. Ed. 2d 228, 241, 100 S. Ct. 2260, 2270) lends support to my belief that the majority thought otherwise.

My colleagues acknowledge the obvious fact that in this case the subsequent charges of reckless homicide against defendant Zegart do not *always* involve crossing a highway dividing median, the lesser charge to which defendant had earlier pleaded guilty. Consequently, the fact that the proof in the trial of the homicide cases will show that defendant crossed the median strip does not, in my opinion, bar the reckless-homicide prosecutions.

The *Blockburger* test providing that a prosecution for the lesser offense does not preclude subsequent prosecution for the greater offense unless the lesser is *always* included within the greater has been a workable, easily understood and easily applied rule. In my opinion we should adhere to it in the absence of an unequivocal pronouncement by a majority of the Supreme Court that it has been superseded. I do not find that announcement in *Vitale,* and I would not voluntarily abandon the *Blockburger* test. Particularly would I not exchange it for the amorphous concept now adopted by this court.

I would reverse the double jeopardy holding of the appellate court.

MR. JUSTICE RYAN joins in this dissent.

APPENDIX B

Order Denying Rehearing

ILLINOIS SUPREME COURT
CLELL L. WOODS, CLERK
Supreme Court Building
Springfield, Ill. 62706
(217) 782-2035

January 29, 1981

Hon. J. Michael Fitzsimmons
State's Attorney
DuPage County Courthouse
Wheaton, IL 60187

No. 51229 —People State of Illinois, appellant, vs. Marla Zegart, appellee. Appeal, Appellate Court, Second District.

The Supreme Court today denied the petition for rehearing in the above entitled cause. Mr. Justice Simon took no part.

Very truly yours,

Clell L. Woods

Clerk of the Supreme Court

APPENDIX C

Order From Appellate Court

OFFICE OF THE CLERK
312-695-3750

STATE OF ILLINOIS
APPELLATE COURT SECOND DISTRICT
Elgin, Illinois 60120

August 2, 1978

THE COURT HAS THIS DAY ENTERED THE FOLLOWING ORDER IN THE CASE OF:

Gen. No. 77-251

People of the State of Illinois, appellant v. Marla Zegart, appellee,

The judgment of the Circuit Court of DuPage County is affirmed. (See attached order.)

LOREN J. STROTZ, Clerk

Hon. J. Michael Fitzsimmons
Malcolm F. Smith
Kevin F. Bowen
A. E. Botti
Douglas Drenk

NO. 77-251

PEOPLE OF THE STATE OF ILLINOIS,
Plaintiff-Appellant,

v.

MARLA ZEGART,
Defendant-Appellee.

ORDER DISPOSING OF APPEAL UNDER SUPREME COURT RULE 23

The sole issue presented in this case is whether the federal constitutional guaranties against double jeopardy, as well as the statutory provisions embodied in section 3-4(b)(1) of the Criminal Code of 1961 (Ill.Rev.Stat. 1975, ch 38, § 3-4(b)(1),) prohibit criminal prosecution for reckless homicide after a conviction for the offense of crossing a median strip based upon the same conduct. The trial court dismissed the indictment for reckless homicide and the State appeals.

From our examination of the record we determine that an opinion would have no precedential value as this issue has been passed upon directly by the Supreme Court of Illinois.

On December 19, 1975 the defendant, while travelling east on the East West Tollway, crossed the median strip into the westbound lane, struck a vehicle driven by Raymond McJohn, Jr. which resulted in the death of two passengers, Margaret McJohn and Kathryn J. Graychek. A traffic citation was issued charging the defendant with crossing a highway median strip in violation of Ill.Rev.Stat., chapter 95½, section 11-708(d). On January 14, 1976 she was convicted upon her plea of guilty upon that charge. Four months later the defendant was charged with two counts of reckless homicide in violation of Ill.Rev.Stat. chapter 33, section 9-3. The defendant moved to dismiss the reckless homicide charges upon the basis of double

jeopardy. On March 15, 1977 the trial court dismissed the indictments.

The issue herein was squarely presented in *In re Vitale* (1978), 71 Ill.2d 229, 375 N.E.2d 87. In that case Justice Dooley considered the application of the double jeopardy clauses in the federal Constitution and the compulsory joinder provisions of the Illinois Criminal Code of 1961 (Ill.Rev.Stat. 1975, ch 38, §§ 3-3(b), 3-4). In *Vitale* the defendant was charged with failure to reduce speed to avoid an accident, was convicted, fined and subsequently charged with involuntary manslaughter. Relying upon *Brown* v. *Ohio* (1977), 432 U.S. 161, 53 L.Ed.2d 187, 97 S.Ct. 2221 and *People* v. *Gray* (1977), 69 Ill.2d 44, 370 N.E.2d 797, the court held:

> "... the two separate statutory offenses of failing reduce speed and involuntary manslaughter need not be identical, either in their basic ingredients or in their proof to be the 'same' within the double jeopardy clause." 71 Ill.2d at 237, 375 N.E.2d at 90.

Justice Dooley concluded that the conviction of the traffic charge of failure to reduce speed to avoid an accident therefore precluded prosecution in a separate action for involuntary manslaughter arising out of the same incident. More compelling is the statement of Justice Dooley:

> "Failing to reduce speed and involuntary manslaughter cannot be fragmented so as to create different offenses. The Double Jeopardy Clause is not such a fragile guarantee that prosecutors can avoid its limitations by the simple expedient of dividing a single crime into a series of temporal or spatial units." 71 Ill.2d at 239, 375 N.E.2d at 91.

The State in its brief contends that the instant situation does not constitute double jeopardy, viz.,

> "A number of acts are involved here, as shown in the amended bill of particulars. These acts in essence are driving too fast for conditions, *failure to reduce speed to*

> *avoid an accident,* improper lane usage, and improper passing on the right or left. All can be considered separate violations and involve different elements and acts." [Emphasis added.]

This is an incorrect statement of the law.

In oral argument the State has contended that the holding of *Vitale,* relative to failure to reduce speed to avoid an accident, is different than the offense of crossing a median strip. It can be seen from the statement in the State's brief that its contention was that failure to reduce speed to avoid an accident was a separate offense which could be tried in a separate trial. This was rejected in *Vitale.* We see no difference between the offense of failure to reduce speed to avoid an accident and the offense of crossing a median strip, both offenses being a part and parcel of the greater offense of reckless homicide or involuntary manslaughter, as the case may be.

The judgment of the trial court is therefore affirmed.

AFFIRMED.

GUILD, SEIDENFELD and BOYLE.

APPENDIX D

State's Bill of Particulars

and

Motion to Amend Bill of Particulars

STATE OF ILLINOIS
COUNTY OF DU PAGE } ss.:

IN THE CIRCUIT COURT OF THE EIGHTEENTH JUDICIAL CIRCUIT DU PAGE COUNTY, ILLINOIS

PEOPLE OF THE STATE OF ILLINOIS,
Plaintiff

v.

MARLA T. LENZA, now known as MARLA T. ZEGART,
Defendant

No. 76 CF 1007

MOTION TO AMEND BILL OF PARTICULARS

Now come the People of the State of Illinois by J. MICHAEL FITZSIMMONS, State's Attorney for DuPage County, Illinois, pursuant to Section 114-2 of the Illinois Code of Criminal Procedure and move this Court to amend the original Bill of Particulars filed by the People in this case (a copy of which is hereto attached) by striking the numbered Paragraph 3 and by striking the numbered Paragraph 8 and in support of said motion, the People state:

1) That the original motion for a Bill of Particulars requested that the People "State or describe each and every reckless act or the reckless manner that the accused operated her vehicle."

2) That numbered Paragraph 3 in the Bill of Particulars listed "Driving across the median strip" as one of a number of acts in response to said request.

3) That the People do not, at this time, expect to rely upon the act of driving across the median strip *per se* as a

reckless act of the defendant. The People do expect to introduce evidence that the defendant did actually cross the median strip but only insofar as it is necessary to prove the allegation of the indictment, the remainder of the Bill of Particulars and the Additional Bill of Particulars. Specifically, the People expect to introduce evidence that the defendant crossed the median strip in order to show the causal nexus between the defendant's conduct prior to actually crossing the median strip and the death of the two victims named in the indictment. Also, such evidence will be introduced in support of the allegation that the defendant was driving too fast for conditions, failing to reduce speed to avoid a collision, failure to drive a vehicle in the proper lane of the roadway and improper passing on the left.

4) That at this time, the People do not believe the evidence is sufficient to prove the act alleged in Paragraph 8.

STATE OF ILLINOIS
COUNTY OF DU PAGE } ss.:

IN THE CIRCUIT COURT OF THE EIGHTEENTH JUDICIAL CIRCUIT, DU PAGE COUNTY, ILLINOIS

PEOPLE OF THE STATE OF ILLINOIS,
Plaintiff

v.

MARLA T. LENZA, now known as MARLA T. ZEGART,
Defendant

No. 76 CF 1007

ANSWER TO BILL OF PARTICULARS

Now come the People by and through JOHN J. BOWMAN, State's Attorney of DuPage County, and his assistant, MARK E. KOWALCZYK, and in answer to the defendant's motion for a Bill of Particulars state as follows:

The State will seek to prove the following acts or omissions of the defendant:

1. Driving too fast for conditions.

2. Failure to reduce speed to avoid an accident.

3. Driving across the center line and median strip.

4. Failure to drive her vehicle in the proper lane of the roadway.

5. Failure to exercise due care for the safety of herself and others rightfully upon the roadway.

6. Improper passing on the right.

7. Improper passing on the left.

8. Failure to wear prescription lenses as required by her driver's license.

JOHN J. BOWMAN
State's Attorney